Office-Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-694 (3)

ARKANSAS POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

UNION OF CONCERNED SCIENTISTS, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM S. JORDAN, III
Counsel of Record

ELLYN R. WEISS

HARMON, WEISS, & JORDAN
2001 S Street, N.W.
Suite 430
Washington, D.C. 20009
(202) 328-3500

Attorneys for Respondent

November 30, 1984

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that where the Nuclear Regulatory Commission has required that emergency preparedness exercises be conducted and that the exercises must demonstrate adequate assurance of safety as a material condition for issuance of an operating license for a nuclear reactor, the Commission may not deny affected members of the public a hearing on whether these requirements have been met?*

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* The parties are identified in the caption of this pleading and in the footnote accompanying the Question Presented as stated at page (i) of the Petition.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Union of Concerned Scientists ("UCS") opposes the petition for a writ of *certiorari* filed in this case.

OPINION BELOW

The opinion of the court of appeals appears at 735 F.2d 1437 (D.C. Cir. 1984).

JURISDICTION

Petitioner asserts jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The statutes involved in this case are the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, particularly § 189(a)(1), 42 U.S.C. § 2239(a)(1), and the Administrative Procedure Act, 5 U.S.C. § 554.

STATEMENT OF THE CASE

This case involves the well-settled issue of whether, where affected members of the public have a statutory right to a hearing on an agency decision, the agency may exclude from the hearing an issue that the agency itself has determined is material to the ultimate decision. The Court of Appeals ruled that the Nuclear Regulatory Commission may not deny affected members of the public a right to a hearing on an issue that the Commission has by regulation established as material to the decision whether to issue an operating license for a nuclear reactor. Although the decision invalidated a rule issued by the Commission, the Commission and the Solicitor General have not petitioned for a writ of *certiorari*.

Section 189(a)(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(1) (1982), provides that in any proceeding for the granting of an operating license for a nuclear reactor, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." The Commission's regulations provide that an affected person may intervene in an operating license hearing upon a demonstration of standing and the filing of at least one contention and the basis for that contention. 10 C.F.R. § 2.714.

After the accident at Three Mile Island, the Commission promulgated a new regulation prohibiting the issuance of an operating license for a nuclear reactor in the absence of a Commission finding that "the state of . . . offsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1), 45 Fed. Reg. 55,409.[1] The Commission also established detailed standards by which to judge compliance with this provision, including a requirement to conduct periodic exercises and drills

[1] The new rule also established that the Commission would base its finding under this section on its review of findings made by the Federal Emergency Management Agency ("FEMA") with respect to "whether State and local emergency plans are adequate and capable of being implemented." 10 C.F.R. § 50.47(a)(2), 45 Fed. Reg. 55,409.

and to correct deficiencies identified as a result of those activities. 10 C.F.R. § 50.47(b)(14), 45 Fed. Reg. 55,409. With respect to plants that had not yet been licensed, the Commission's new rule required that a full-scale emergency preparedness exercise be conducted "within one year before issuance of the operating license for full power." 10 C.F.R. Part 50, Appendix E, § IV(F)(1)(b), 45 Fed. Reg. 55,413. Taken together, these provisions require the performance of an emergency preparedness exercise and the correction of any material deficiencies before issuance of an operating license.

In 1982, the Commission issued the rule in question here:

> Emergency preparedness exercises . . . are part of the operational inspection process and are not required for any initial licensing decision.

10 C.F.R. § 50.47(a)(2) (1983). Despite that language, the Commission left intact the requirement that a full scale exercise be conducted within one year before issuance of the operating license and the requirement that all material deficiencies be corrected.[2]

Indeed, the Commission at that time reiterated that "exercise[s] will be held before full power operation and all significant deficiencies will be properly addressed." 47 Fed. Reg. 30,233 (1982). The Commission has since emphasized that its "evaluation of the exercise results . . . [is] part of the administrative record for the licensing decision and thus subject to judicial review." Brief for Respondent, Summary of Argument, *Union of Concerned Scientists* v. *Nuclear Regulatory Commission,* 735 F.2d 1437 (D.C. Cir. 1984). Thus, the Commission interprets its regulations as requiring the evaluation of the emergency preparedness exercises as a material condition of issuance of an operating license.

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[2] In the same rulemaking proceeding, the Commission slightly amended the language of 10 C.F.R. § 50.47(a)(2) to provide that the Commission shall base its findings upon a review of FEMA findings "as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented." 47 Fed. Reg. 30,235-36 (1982).

Although that point was central to the argument below and to the Court's decision, the Commission never argued that the emergency preparedness exercises and their results were no longer material to the licensing decision. Rather, the Commission sought to justify excluding the results of emergency preparedness exercises from operating license hearings on the ground that this would allow the exercises to be held at a time closer to full power operation of the plant, thereby making them more meaningful. *See* 47 Fed. Reg. 30,233 (1982); 48 Fed. Reg. 16,693 (1983).

The Union of Concerned Scientists ("UCS") challenged the Commission's rule on the ground that the effect of the rule was to deny affected members of the public an opportunity for a hearing on issues that the Commission's regulations establish are material to the issuance of an operating license. The Court of Appeals vacated the rule on that basis.

First, the court held that "once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the intervenor." Pet. App. at 13a-14a.[3] In so doing, the Court rejected the proposition that the Commission may exclude some material issues from the hearing by considering them to be relevant only to ultimate issuance of the license, rather than to the question whether to authorize issuance of the license. *Id.* at 11a.

Second, the court held that the Commission has no discretion under § 189(a)(1) of the Atomic Energy Act to eliminate from licensing hearings issues that are material to the licensing decision. At the same time, the court emphasized that the Commission has considerable discretion to determine what issues are relevant and material to its licensing decisions, and that the Commission may summarily dismiss any claim that does not raise genuine issues of material fact. Pet. App. at 23a-25a. What the Commission may not do is exclude from the licensing hearings issues that the Commission itself has established are material to the licensing decision. *Id.* at 15a-18a, 23a-25a, 30a.

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[3] The decision below, as reprinted with the Petition, will be cited "Pet. App. at ."

Finally, the court held that the Commission could not exclude the results of emergency preparedness exercises from operating license hearings under the Administrative Procedure Act exception for "decisions [that] rest solely on inspections, tests, or elections." 5 U.S.C. § 554(a)(3). Relying upon the purpose of this language and the interpretation indicated by the legislative history and the Attorney General's report, the court held that the exception was designed "for on the spot decisions made by a qualified inspector who himself 'saw . . . tested . . . or examined' the evidence," for issues peculiarly within the expertise of the agency staff, and for issues unsuited to resolution in a hearing context. Pet. App. at 25a-28a. Accordingly, the court held that the exception did not extend to evaluation of emergency preparedness exercises, which requires the Commission to weigh and balance evidence from several parties whose expertise on the questions at issue is at least as great as the Commission's. The other parties whose evidence the Commission must consider include state and local governments and the Federal Emergency Management Agency. Indeed, FEMA's views are accorded presumptive validity in the Commission's licensing process. Pet. App. at 29a-30a, 6a.

Judge McKinnon dissented. In essence, he argued that the majority had intruded on the Commission's determination that its licensing findings are "predictive" in nature by requiring the Commission to consider in the hearing matters that the Commission did not consider to be necessary to make the required prediction with respect to emergency preparedness. Pet. App. at 31a-39a.

REASONS THE WRIT SHOULD BE DENIED

This case is not worthy of review in this Court. The principles on which the decision below is based are well established and beyond question. There is no conflict between the decision below and any other decision of the Courts of Appeals or of this Court. The decision below respects and leaves intact the Commission's broad authority and discretion with respect to the showing that must be made in order to justify issuance of an operating license for a nuclear reactor.

1. The decision below depends upon two basic propositions. First, Commission regulations establish that the holding of an emergency preparedness exercise within one year before issuance of an operating license, and the correction of all significant deficiencies revealed by the exercise, are material considerations in deciding whether to issue an operating license. Pet. App. at 17a-18a. Second, since the success of the exercise and the identification of deficiencies as a result of the exercise are material to the licensing decision, affected members of the public have a right under § 189(a)(1) of the Atomic Energy Act to a hearing to the extent that they raise genuine issues of material fact related to those requirements. Pet. App. at 15a-17a, 30a.

The first proposition is undisputed. As previously discussed, the Commission in its rulemaking document and in its brief below emphasized that a successful exercise and correction of all significant deficiencies are conditions to issuance of an operating license. The Petition does not dispute this proposition.

The second principle is fundamental to the practice of administrative law under the Administrative Procedure Act. It is reflected in one of the principal cases involving the Atomic Energy Act, *Siegel* v. *Atomic Energy Commission,* 400 F.2d 778, 784 (D.C. Cir. 1968) (hearings under the Atomic Energy Act "presumably must embrace all relevant matters"). It is also consistently applied across the board whenever a statute provides that those affected by an agency's actions are entitled to an opportunity for a public hearing. *See, e.g., General Motors Corp.* v. *Federal Energy Regulatory Commission,* 656 F.2d 791, 795 & n. 7 (D.C. Cir. 1981); *Public Service Co. of New Hampshire* v. *Federal Energy Regulatory Commission,* 600 F.2d 944, 955 (D.C. Cir.), cert. denied, 449 U.S. 990 (1979); *Independent Bankers Association of Georgia* v. *Board of Governors of the Federal Reserve System,* 516 F.2d 1206, 1120 (D.C. Cir. 1975). There is no debate that where the governing statute grants affected members of the public a right to a hearing on an agency decision, the agency may not exclude from the hearing issues that are material to the agency's decision.

Petitioner here seeks to avoid these principles by arguing that the Commission has the discretion under the Atomic Energy Act to determine which issues it may consider in the licensing hearing and which issues it may decide outside the context of the licensing hearing. The Petition can cite no statutory authority for this proposition because there is none. The language of § 189(a)(1) of the Atomic Energy Act establishes the public's right to a hearing on the "granting" of an operating license. Neither that section nor any other provision of the Atomic Energy Act authorizes the Commission to exclude from the hearing any issues that are material to the ultimate decision.[4]

Petitioner relies upon legislative history to the effect that a Commission licensing board may "impose conditions in any decision on whether a . . . license should issue," and may then

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[4] The Petition cites *Chevron, U.S.A., Inc.*, v. *Natural Resources Defense Council*, _____U.S._____, 104 S. Ct. 2778 (1984), for the proposition that the Court below should have accepted the Commission's interpretation of § 189(a)(1) of the Atomic Energy Act as reasonable in the absence of a contrary indication by Congress specifically on point. The case is inapposite. It involved an interpretation of the substantive requirements of the Clean Air Act by the Environmental Protection Agency in an area both highly technical and complex. The issue here is not complex or technical substantive requirements well within the expertise of the Nuclear Regulatory Commission, but a procedural requirement intended as a check on the actions of the Commission. H. R. Rep. No. 22, Part 2, 97th Cong., lst Sess. 11 (1982). Thus, far from accepting practically any position taken by the agency, the courts should be skeptical of agency interpretations that serve to minimize public scrutiny and reduce checks on agency actions. That is particularly true in the case of Commission interpretations of the hearing provisions of the Atomic Energy Act because the Commission has been trying without success for nearly a decade to alter those provisions to reduce public participation requirements. See discussion at 8-11, *infra*. The courts must not grant the Commission the relief that Congress has thus far consistently refused.

Moreover, unlike a technical substantive issue limited to a single expert agency, hearing rights are subject to generally applicable principles such as those applied by the court below. Where, as here, an agency action flies in the face of those principles, it should be struck down unless the agency can specifically identify statutory language demonstrating why the principles should not apply. There is no such language in the Atomic Energy Act.

"specify whether a further hearing should be held to determine whether the conditions had been satisfied." Pet. at 15.[5] As the court below explained, Pet. App. at 21a-22a, and because these statements were made by the Staff of the Joint Committee on Atomic Energy rather than by the Committee itself, the significance of this language is open to serious question. Accepting, *arguendo,* however, that this language can reasonably be consulted, it does not contradict the decision reached by the Court of Appeals. In fact, it is not relevant to the issue at hand.

The cited language indicates that the licensing board may, presumably on the basis of a hearing, establish conditions that must be met before a license may be issued. The question here, however, is what issues the public is entitled to raise before the licensing board in the first instance. The answer given by the court below, and by all other courts that have addressed the same issue, is that the public is entitled to raise and litigate issues material to the licensing decision. If, on the basis of that litigation, the licensing board then established conditions that must be met before the license was issued, that would be a circumstance far different from what is now before the Court. If the cited legislative history has some current vitality, the licensing board might well be able to set such conditions and decide that there should be no further hearing. That is not this case, however, and the Petition's argument on this point is irrelevant to the issues at hand.

Moreover, as discussed in the decision below, Congress recently considered the extent of the hearing requirement established by § 189(a)(1) of the Atomic Energy Act. Pet. App. at 19a-21a. At that time Congress granted the Commission partial relief from the requirement, but the relief was strictly limited. With respect to license amendments, Congress permitted the Commission to avoid a pre-amendment hearing only if the Commission made a finding that the amendment in question involved "no significant hazards consideration." 42 U.S.C. § 2239(a)(1). Congress also granted the Commission

[5] The Petition is cited as "Pet. at ."

temporary authority until December 31, 1983, to issue temporary operating licenses, but only at power levels no greater than 5% of full power. 42 U.S.C. § 2242.

Significantly, both of these amendments retained the public's right to a full hearing on all issues material to the licensing decision. They simply permitted the Commission to hold the hearing after issuing the amendment or temporary low power license, rather than before. By contrast, the Petition here seeks to authorize the Commission to eliminate material issues from the licensing hearing altogether, with no right to a hearing either before or after the licensing decision. This is a radical effort that goes far beyond anything that Congress has been willing to permit. It is directly contrary to Congress' intent that the hearing process encompass all relevant issues. H. R. Rep. No. 22, Part 2, 97th Cong., lst Sess. 11 (1982).

In seeking authority for temporary operating licenses, the nuclear industry made virtually the same delay and cost arguments to Congress that the Petition now addresses to this Court. The industry claimed in 1981, for example, that "regulatory delay" would affect 13 plants and cost from $2.7 to $10 billion.[6] In fact, this "regulatory delay" was a myth. The actual dates at which plants were physically completed and ready to operate were years later than the dates predicted by the industry,[7] and the Commission never used the authority to issue temporary operating licenses. The licensing "delays"

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[6] *Nuclear Power Plant Licensing Delays and the Impact of the Sholly versus NRC Decision: Hearings Before the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works,* 97th Cong., lst Sess. 50 (1981) (statement of William S. Lee).

[7] For example, although the industry estimated in 1981 that Diablo Canyon Unit No. 1 would be completed by March 1981, it was not actually completed until May 1984. Similarly, the industry estimated that Shoreham would be completed in September 1982, but it was not completed until May 1984. The industry-Commission predicted completion dates appear in the hearing record cited above, *id.* at 61. The actual completion dates are derived from the NRC Quarterly Report submitted to Congressman Tom Bevill, Chairman of the Subcommittee on Energy and Water Development of the House Committee on Appropriations, on May 2, 1984.

evaporated. Former NRC Commissioner Peter A. Bradford, speaking later on behalf of the National Association of Regulatory Utility Commissioners, referred to these industry claims as "The Great Licensing Delay Hoax of 1981." [8]

Despite efforts by the Commission and the industry, based upon similar arguments, to extend the Commission's authority to issue temporary operating licenses, Congress refused to do so.[9] The Commission's authority to issue temporary operating licenses expired on December 31, 1983.

In fact, the Commission and the nuclear industry have sought for the past decade to restrike the balance between public participation and speed in issuing licenses. With the exception of the minor amendments related to issuance of license amendments and temporary operating licenses, Congress has rejected every one of the industry and Commission proposals to reduce the public's hearing rights. Congress has also failed to enact legislation that would expedite the hearings that are now required.[10] Far from indicating Congressional acceptance of industry delay arguments and efforts to exclude issues from the hearing process, this history establishes that Congress understands the vital role of public scrutiny and will not allow the Commission to avoid it, as the Commission attempted to do in this case.

Thus, to the extent that the legislative history of §189(a)(1) is relevant to the issues at hand, it indicates that Congress considers the opportunity for a public hearing to be of

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[8] Testimony of Peter A. Bradford, Chairman, Maine Public Utilities Commission, Chairman, National Association of Regulatory Utility Commissioners (NARUC) Subcommittee on Nuclear Issues, before the Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works, July 14, 1983, at 8-9.

[9] S. Rep. No. 546, 98th Cong., 2d Sess. 21; Cong. Rec. H12192-5 (daily ed. October 11, 1984) (statement of Rep. Broyhill).

[10] For example, Congress declined to enact provisions in the proposed Nuclear Siting and Licensing Act of 1978, H.R. 11704 and S. 2775, 95th Cong., 2d Sess. (1978), which would have eliminated adjudicatory hearings on environmental issues and permitted interim operation and interim amendment of licenses without adjudicatory hearing rights. *See, also, e.g.*, the following bills introduced in 1983 to restrict public participation rights, but not enacted, H.R. 2511, H.R. 2512, S. 893, S. 894, 98th Cong., lst Sess. (1983).

primary importance in the regulation of nuclear power. Certainly the legislative history provides no basis for allowing the Commission to exclude from its hearings issues that are material to its ultimate licensing decision.

2. The Petition seeks to create a conflict between the decision below and previous decisions of this Court concerning agency authority to reach substantive decisions through the rulemaking process, rather than through individual adjudications. The effort must fail because the cases cited in the Petition are irrelevant to this one.

The Petition relies primarily upon *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), in which this Court upheld the Federal Communications Commission's refusal to grant a hearing to a license applicant where the applicant already held the maximum number of broadcast station licenses allowed by Commission regulations. Similarly, in *Federal Power Commission* v. *Texaco*, 377 U.S. 33 (1964), this Court upheld FPC refusal to grant a hearing where an application on its face sought price clauses prohibited by FPC regulations. The principle established in *Storer* and followed in *Texaco* is that when an agency reaches generic substantive decisions through the rulemaking process, it may rely upon those decisions in later adjudicatory hearings related to particular cases. Thus, for example, having determined as a matter of substantive application of the "public interest" standard of the Federal Communications Act to prohibit ownership of more than a given number of stations, the FCC was not required to grant a hearing to an applicant who already owned the maximum number of stations.

The Commission has a rule that applies this principle to its hearings. 10 C.F.R. § 2.758. The Commission never claimed that this rule applies to the issues before the Court of Appeals.

The *Storer* and *Texaco* principles do not conflict with the decision below. In this case, the generic decision comparable to those upheld in *Storer* and *Texaco* is the Commission's generic substantive determination to require emergency preparedness exercises and correction of all significant deficiencies as a condition of issuing an operating license. That decision is not in

dispute. Rather, the issue is whether, given that generic standard, members of the public are entitled to a hearing in individual cases on whether the substantive standard has been complied with. None of the cases cited in the Petition reaches that issue, and none is in conflict with the decision below on that point.

The Petition also attempts to create a conflict between the decision below and this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519 (1978). Without explaining why there is any conflict, the Petition suggests that this Court's endorsement in *Vermont Yankee* of a "threshold test" for determining admissibility of contentions in reactor licensing proceedings for some reason would authorize the Commission to deny affected members of the public the right to a hearing on issues material to the issuance of an operating license.

The argument is a *non sequitur.* Under the decision below, parties would still have to meet the threshold test for admissibility of contentions on particular issues, including challenges to the emergency preparedness exercise.

In fact, to the extent that *Vermont Yankee* is relevant here, it is consistent with the decision below, and it demonstrates that the Commission has ample authority to conduct its licensing hearings efficiently. The "threshold test" discussed in *Vermont Yankee* constitutes a requirement that prospective intervenors provide the Commission with information sufficient to allow the Commission to determine whether there is a genuine issue of material fact under the applicable regulatory requirements. The court below has itself emphasized that the Commission may dismiss contentions if they do not meet such a test. Pet. App. at 23a-24a. Since the Commission may impose such a test, it has the authority to assure that any litigation of emergency preparedness exercises is limited to genuine issues of material fact. To the extent that the Commission exercises this authority, it will avoid litigating any issues other than those that the Commission itself, through its regulations governing emergency preparedness, has determined are material to the licensing decision.

3. The Petition argues that the decision below undermines the Commission's discretion to base issuance of a license on a prediction that the plant will operate safely, rather than on a review of actual plant operation.[11] There is no basis for this claim or for any other assertion that the decision diminishes the scope of the Commission's authority or discretion.

Any decision to license a nuclear reactor before it begins operation necessarily involves some element of prediction. In determining the scope of a licensing hearing, the question is what Commission regulations require, and what the applicant must show in order to demonstrate that the application complies with the regulations and that there is a reasonable assurance that the reactor can be operated safely. In general, for example, a licensing decision must be based upon a finding that the plant has been built according to the conditions in the construction permit, and a finding that the plant complies with applicable regulations. 10 C.F.R. § 50.57. These findings of fact, which are not themselves predictions, are necessary to support the ultimate conclusion that there is reasonable assurance that the reactor will operate safely. Thus, Commission licensing determinations are predictive in the same sense that any prospective adjudication determines existing facts and then reaches a conclusion as to what may occur in the future. Facts discovered later may demonstrate that the findings or conclusions were incorrect, but that is the case in any fact-finding situation.

The important question is not whether the Commission may reach conclusions, whether predictive or otherwise, but what findings the Commission must make in order to support its conclusions. As previously discussed, Commission regulations establish that completion of an emergency preparedness exercise within one year before issuance of the operating license and correction of all significant deficiencies identified by the exercise are material to the licensing decision. These are the threshold requirements that must be met and the factual findings that must be made in order to make the prediction

[11] Judge McKinnon's dissent is based on essentially the same proposition.

necessary to issue an operating license. Thus, the decision below in no way impinges upon the Commission's determination that its licensing decision is predictive in nature. Rather, the decision simply requires that the public's statutory right to a hearing under § 189(a)(1) of the Atomic Energy Act must encompass all matters that the Commission, through its regulations, has determined are material to its licensing decision.

Far from threatening the breadth of the Commission's authority and discretion, the decision below emphasizes the extent of the Commission's authority to adopt or alter substantive licensing standards, subject only to the requirement that Commission decisions in these areas not be arbitrary and capricious. Pet. App. at 23a-24a. Accordingly, should the Commission determine that compliance with these emergency preparedness requirements is not necessary to make the predictive finding necessary for issuance of an operating license, the Commission has the authority and considerable discretion to make that decision by altering its substantive standard.

4. As previously noted, the court of appeals rejected the argument that emergency preparedness exercises constitute "inspections [or] tests" that are exempt from formal hearing procedures under 5 U.S.C. § 554(a)(3). Pet. App. at 25a-30a. The Petition challenges this aspect of the decision on the ground that the interpretation would require the Commission to grant hearings on pre-operational tests and inspections that have traditionally occurred after the licensing hearing is closed. Pet. at 21-22 & n. 20.[12]

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[12] The Petition also complains that the court below ignored a Commission finding that emergency preparedness exercises are "analogous" to pre-operational testing and that both activities are equally crucial to the Commission's ultimate safety findings. Pet. at 22 n. 20. This argument is incorrect.

First, the court specifically addressed the Commission's arguments with respect to the comparison between emergency preparedness exercises and pre-operational testing. Pet. App. at 25a-30a. Applying the "tests and inspections" exception to APA hearing requirements, the court below held that matters peculiar to the emergency preparedness exercises prevented those exercises from falling with the exception. The points on which the court based this determination include particularly the involvement of state and local

(footnote continued)

There is no basis for this assertion. The court below held that the emergency preparedness exercises at issue are distinctly different from pre-operational testing and from the tests and inspections contemplated by the APA exception. The court relied particularly on the fact that the Commission's decision with respect to the adequacy of emergency preparedness exercises is based upon evidence from a number of sources, including state and local governments and FEMA, and involves the "weighing of many other person's observations and first hand experiences, [and consideration of] questions of credibility, conflicts, and sufficiency." Pet. App. at 27a. Thus, the "ordinary reasons for requiring a hearing come into the picture" when the Commission considers the adequacy and outcome of emergency preparedness exercises. *Id.*

The Petition fails to demonstrate that these considerations would require the Commission to include pre-operational tests in licensing hearings. Unlike emergency preparedness exercises, these highly technical issues are directly within the expertise of the NRC Staff. Cf. Pet. App. at 27a. There is no need for input from sources such as states, localities, or other federal agencies. Thus, questions of credibility, conflict, or sufficiency are much less likely to arise, and there is no reason to believe that the principles that govern the decision below would require hearings on pre-operational tests and inspections.

Moreover, as recognized by the court below, if the APA "tests and inspections" exception were interpreted as broadly as the Petition suggests, the exception would swallow the rule. It

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(footnote continues)

governments and FEMA and the need to weigh and balance testimony from many sources in a manner that normally requires a hearing. *Id.* at 27a, 29a-30a. None of these points applies to consideration of traditional pre-operational testing. Thus, even if emergency preparedness exercises could be considered in some way analogous to pre-operational testing, the analogy is not complete enough to require the two to be treated the same under the "tests and inspections" exception.

Second, the fact that both the exercises and the tests are equally crucial to ultimate Commission findings is irrelevant. The question is not how important they are, but how they develop information and how that information is used in the decision making process. As the court explained, that is what distinguishes the two.

would become virtually impossible to prevent the Commission or other agencies from applying the exception to ever broader categories of decisions. Ultimately, agencies "would have unfettered discretion to do away with hearings altogether and replace them with staff inspections as the sole method of developing evidence for [their] ultimate decision[s]." Pet. App. at 26a. That is not what Congress intended by this narrow exception to fundamental hearing requirements.

5. The Petition's claims with respect to the practical impact of the decision below are utterly without factual support in the record and paint a grossly distorted picture. Based upon recent history of nuclear reactor licensing, there is no basis for these claims.

According to Commission figures, pre-operational tests and inspections and other preparations for issuance of a full power license have taken an average of some 6.4 months for reactors whose full power licenses were issued after July 8, 1981.[13] For the seven plants for which UCS has dates of commercial operation, the average period between issuance of the operating license and commercial operation is an additional 9.9 months.[14] Any argument that delay and monetary cost associated therewith may result from the decision below must demonstrate that the delay is in addition to these existing time periods. The Petition has made no effort to address this point, nor could it make such a showing.

When these time periods are considered, the argument that the decision below should result in any significant delay of commercial operation quickly evaporates. Since resolution of

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[13] This figure is derived from information in Commission files for the following plants: Callaway, Grand Gulf, LaSalle, McGuire Units 1 and 2, San Onofre Units 2 and 3, St. Lucie Unit 2, Summer Unit 1, Susquehanna Units 1 and 2, and WPPSS Unit 2. Of those plants, Grand Gulf required the longest period from issuance of the low power license to issuance of the full power license, 26 months. When Grand Gulf is removed from the calculation, the average is still more than 4.5 months.

[14] The plants are LaSalle, McGuire Units 1 and 2, San Onofre Unit 2, St. Lucie Unit 2, Susquehanna Unit 1, and Summer Unit 1.

emergency preparedness issues is not necessary prior to issuance of a license authorizing low power operation, 10 C.F.R. § 50.47(d), the Commission may issue such a license before litigation of the emergency preparedness exercise. This allows the reactor to complete all of the various testing required prior to issuance of a full power license at the same time that emergency preparedness questions are resolved. Thus, no delay can be attributed to emergency preparedness exercises themselves.

As the court below emphasized, the Commission also has the authority to expedite licensing hearings by completing all other aspects of the hearing first, and leaving litigation of the emergency preparedness exercise for a later date. Based upon the average period between issuance of a low power license and issuance of a full power license, there is ample time to conduct a hearing limited to the emergency preparedness exercises without any delay in issuance of the operating license. Moreover, to the extent that the time between issuance of the operating license and the beginning of commercial operation can be shortened, a hearing could take several more months and still not delay full power operation beyond the current average time required to reach full power. Thus, the Petition's claims of delay and increased cost are invalid, just as the industry's claims were in The Great Licensing Delay Hoax of 1981.

6. As reflected in Rule 17 of the rules of this Court, review on a writ of *certiorari* is not a matter of right. Particularly in light of the increasing burden on this Court, *certiorari* is justified in limited circumstances. Here, there is no conflict between the decision below and that of any other court. The case does involve an important question of federal law, the principle that statutory hearing rights extend to all issues material to the agency decision, but that question has long been settled, and there is no need for further review. To the extent that the Petition seeks to raise other issues or to characterize the issues in other ways, the Petition is incorrect, and it does not raise important questions of Federal law that require consideration by this Court.

The clearest indication of the lack of any need for review in this Court is the fact that the Solicitor General has declined to file a petition for *certiorari* on behalf of the Nuclear Regulatory Commission. The Solicitor General has broad responsibility to consider the impact of the decision below upon both the Nuclear Regulatory Commission and all other agencies. The fact that he has determined that there is no need for Supreme Court review of that decision should be given substantial weight.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

WILLIAM S. JORDAN, III
Counsel of Record

ELLYN R. WEISS

HARMON, WEISS, & JORDAN
2001 S Street, N.W.
Suite 430
Washington, D.C. 20009
(202) 328-3500

November 30, 1984